No. 90-1018

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC., INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,

Petitioners,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeal of the State of California properly hold that California's generally applicable sales and use tax assessed on the petitioner's distribution of religious literature was not imposed, directly or indirectly, on a religious sacrament and not prohibited by the Religious Clauses of the First Amendment?

2. Did the Court of Appeal properly hold that the petitioner's claim for refund was procedurally barred in consequence of the petitioner's failure to exhaust its administrative remedies as required under California law by raising such claim before the California Board of Equalization prior to filing a suit for tax refund?[1]

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[1] In its petition before this Court, petitioner presents two questions (First Amendment and procedural bar) but briefs only one (First Amendment).

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STATEMENT OF THE CASE

Respondent State Board of Equalization of the State of California ("Board") adopts, and incorporates by reference, the statement of facts set forth in the unpublished opinion of the Court of Appeal of the State of California. This opinion is attached as Appendix 2 to the petition for

writ of certiorari filed herein by petitioners International Society for Krishna Consciousness of California, Inc. and International Society for Krishna Consciousness, Inc. ("ISKCON"). (Petn. App. 3-9).

REASONS FOR DENYING THE PETITION

1. The Courts Below Fully Considered And Correctly Decided These Questions

The questions presented here have been fully considered and correctly decided by the Superior Court and Court of Appeal. Discretionary review has been denied by the Supreme Court of the State of California.

This case was initiated by ISKCON as a suit for tax refund (Cal. Rev. & Tax Code §§ 6933, 6934).[2] At the administrative level, the Board ruled that (1) books and pamphlets distributed by ISKCON's devotees from the Los Angeles Temple were gifts in exchange for donations and subject to use tax calculated on the basis of cost to ISKCON of the books distributed (2) the books and pamphlets that were transferred to the other temples in California were sold and therefore ISKCON was required to pay a sales tax on the books based on the invoice prices and (3) no tax was imposed on the proceeds of donations resulting from the practice of Sankirtan.[3] (App. 7.)

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[2] All statutory references are to the Revenue and Taxation Code of the State of California unless otherwise specified.

[3] Sankirtan is a ritual that consists of the dissemination of religious tracts and small gifts to the public and the solicitation of funds to support the religion. (Petn. 2; App. 4.)

ISKCON sought to recover sales and use taxes paid under protest for its sales of religious literature to other, separately-incorporated temples and for its use of such material in storing and withdrawing it from inventory in California. ISKCON alleged (1) that application of these taxes to an organization such as it violated the Free Exercise and Establishment clauses of the federal and state Constitutions and (2) that its failure to file claims for tax refund as required by California law (§ 6932; §§ 6901-6905) did not constitute a waiver of such claims (§ 6905) nor preclude trial court jurisdiction to consider such claims under State anti-injunction requirements. (Cal. Const. Art. XIII, § 32.)

The superior court considered ISKCON's claims and issued its judgment denying recovery. This judgment was considered and affirmed by the court of appeal in an unpublished opinion.[4] ISKCON's petition for review of

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[4] In denying the Board's request for publication of this opinion, the Court of Appeal stated:

> "In terms of federal constitutional issues, the opinion merely applies the binding holding of *Jimmy Swaggart Ministries v. Board of Equalization* (1960) – U.S. ___; 110 S. CT. 608, 615-627, to [ISKCON] in the present case and establishes no new rule of law. As to the independent state grounds question, the opinion relies on established California Supreme Court holdings. Furthermore, since 1947 when the California Supreme Court issued its opinion in *Watchtower B. & T. Soc. v. County of L.A.* (1947) 30 Cal.2d 426, 430, it has been firmly established that the religious provisions of the California Constitution are not violated by 'a uniform tax for revenue imposed upon all alike . . . ' assessed on the property of a religious

(Continued on following page)

this unpublished opinion was denied by the California Supreme Court on September 26, 1990.

The Board submits that this opinion is a thorough, scholarly and correct review and rejection of the grounds raised by ISKCON in its claim for refund. The court of appeal found no violation of ISKCON's religious freedom rights because *no tax is imposed – directly or indirectly (App. 4) – on ISKCON's religious sacrament of Sankirtan*. (App. 14; see also App. 7.) The court determined that the tax was imposed upon the privilege of ISKCON's storage, use or other consumption of tangible personal property in California and *not on the right to disseminate religious beliefs* or ideas. (App. 17.) The sales tax was imposed *not on donations* but on sales from ISKCON to separately-incorporated temples (App. 12.) The tax was calculated based upon ISKCON's invoice prices (App. 7), a value which ISKCON assigned to each publication and billed to those temples (App. 5). The use tax was imposed on books which ISKCON purchased outside California and brought into the state for storage and distribution to the public; it was calculated on the cost of the books to ISKCON. (App. 12-13.) ISKCON has never argued that *payment* of the tax violates its religious beliefs or practices. (App. 19, 20.)

(Continued from previous page)

institution. This court's unpublished opinion adds nothing new of substance to this area of law." A true and correct copy of the Recommendation Against Publication filed by the Court of Appeal on August 1, 1990, is attached as Appendix A.

This tax was levied solely for the purpose of defraying general government expenses and not aimed at restricting the exercise of religion. (App. 17). There is no danger that Sankirtan has been singled out. (App. 19.)

The court correctly determined that this tax on the secular process of distribution and sale of tangible personal property (App. 18) was not barred by either Free Exercise (App. 13-21) or Establishment (App. 21-24) clauses. Consequently, the Board submits that this unpublished opinion should be left unchanged and this petition denied. This is consonant with this Honorable Court's determinations in *Jimmy Swaggart Ministries v. Bd. of Equalization,* (___ U.S. ___ (1990); 110 S. Ct. 688 (No. 8-1374).)

2. This Honorable Court's Prior Decisions Are Controlling

In *Jimmy Swaggart Ministries,* this Court determined that California's sales and use tax was applicable to the distribution of religious materials and that it violated neither Free Exercise (*ibid.* pp. 693, 696) nor Establishment (*id.* pp. 697-699) clauses. Additionally, this Court determined that a taxpayer's failure to comply with California law – requiring that an administrative claim for tax refund must state the specific grounds for such claim – was a procedural bar to recovery. (*Id.* pp. 700-701.)[5]

The Board submits that this Court's decision in *Jimmy Swaggart Ministries* is controlling here. This is especially

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[5] ISKCON's petition raises but does not brief this procedural issue.

so because, while *Swaggart's* transactions were at the retail or public contact level, ISKCON's transactions were at the wholesale or commercial level (sales to other, separately-incorporated temples and use of materials in storing and withdrawing them from inventory). Thus, the court of appeal noted (App. 17-18):

> "[ISKCON] claim[s] that the tax applies only to voluntary donations generated in conjunction with the dissemination of religious literature. This argument is unpervasive because it is factually incorrect and inconsistent with [ISKCON's] statement in their opening brief that the tax is not imposed at the retail sale or public contact level, rather, it is imposed at the retail sale-publishing and 'wholesale' distributor levels . . . Furthermore, the tax is imposed on the secular process of publishing and distribution by sale of tangible personal property. It is not imposed directly on the Sankirten(sic) practice."

CONCLUSION

The constitutional and procedural questions presented here have been thoroughly reviewed and correctly decided by the court of appeal in its unpublished opinion. That opinion merely applies this Court's holding in *Jimmy Swaggart Ministries v. Bd. of Equalization, supra,* 110

S.Ct. 608. The petition for writ of certiorari should be denied.

Dated: January 24, 1991

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, et al., Plaintiffs and Appellants, v. BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al., Defendant and Respondent.	2d Civil No. B026332 (Super. Ct. No. C360177) RECOMMENDATION AGAINST PUBLICATION (Cal. Rules of Court, rule 978(a)) (FILED AUG 1 1990)

The court has read respondent's request that the opinion filed July 5, 1990, be published. The request is denied because the opinion does not meet the standards for publication of Court of Appeal opinions. (Cal. Rules of Court, rule 976(b).) In terms of federal constitutional issues, the opinion merely applies the binding holding of *Jimmy Swaggart Ministries v. Board of Equalization* (1990) ___ U.S. ___; 110 S.Ct. 688, 695-697, to plaintiffs in the present case and establishes no new rule of law. As to the independent state grounds question, the opinion relies on established California Supreme Court holdings. Furthermore, since 1947 when the California Supreme Court issued its opinion in *Watchtower B. & T. Soc. v. County of L.A.* (1947) 30 Cal.2d 426, 430, it has been firmly established that the religious freedom provisions of the California Constitution are not violated by "a uniform tax for

revenue imposed upon all alike . . . " assessed on the property of a religious institution. This court's unpublished opinion adds nothing new of substance to this area of law. A copy of this recommendation plus the request to publish the opinion are to [sic] forwarded to the California Supreme Court and the parties.